In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-73

ADELAIDE SHIPPING LINES, LTD.,
SALEN REEFER SERVICES AB, and M. V. GLADIOLA,
Petitioners,

vs.

SUNKIST GROWERS, INC.,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Is a determination whether "due diligence" is a prerequisite to exemption from fire liability academic when the fire was caused by "design or neglect" and "actual fault or privity" within the meaning of 46 U.S.C. §§ 182 and 1304(2)(b)?

2. If not, is the exercise of "due diligence" to make the vessel seaworthy at the inception of the voyage a prerequisite to the COGSA fire exemption, 46 U.S.C. § 1304 (2)(b)?

STATEMENT OF THE CASE[1]

Petitioner Adelaide Shipping Co., Ltd. is the owner of the GLADIOLA (F.F. 2).[2] Petitioner Salen Reefer Services AB is the time charterer of the vessel (F.F. 3) and, as such, is precluded from relying on the Nineteenth Century Fire Statute, 46 U.S.C. § 182. *In Re Barracuda Tanker Corp.*, 409 F.2d 1013, 1015 (2d Cir. 1969). Therefore, even if the petitioners' contentions respecting the Nineteenth Century Fire Statute were to be accepted as true, there is no basis for reversing the Court of Appeals' decision insofar as the time charterer, Salen, is concerned.

As the Court of Appeals held, the material facts are uncontroverted and the evidence is overwhelming that the two corporate petitioners fail to qualify for either fire exemption because (as a result of the personal "design and neglect"[3] and lack of "due diligence" of their managing officers and supervisory employees) they created a condition of "inexcusable unseaworthiness." (Opinion pp. 2, 14-15, 17-18). This holding is based on the following:

First, "the crew should have been given specific instructions on the proper way to deal with engine room fires and the exact method of handling fire extinguishers." (F.F. 33). Petitioners had the duty to provide a vessel with a fully and

1. The facts are set forth in the opinion of the Ninth Circuit. Respondent will not burden the record by repeating them in detail.

2. The District Court's Finding of Fact (referred to herein as "F.F.") and Conclusion of Laws (referred to herein as "C.L.") are set forth in Appendix A to the Petition for a Writ of Certiorari. The opinion of the Ninth Circuit (referred to herein as "Opinion") is set forth in Appendix B to that Petition, and page references are to that appendix.

3. The phrase "design or neglect" used in the Nineteenth Century Fire Statute and the phrase "actual fault or privity" used in the COGSA fire exemption have the same meaning. *Asbestos Corp., Ltd. v. Compagnie de Navigation*, 480 F.2d 669, 672 (2d Cir. 1973).

properly trained crew. Petitioners' failure to fulfill that duty constituted personal "design and neglect" and "actual fault or privity." *New York Mdse. Co. v. Liberty Shipping Corp.*, 509 F.2d 1249, 1252 (9th Cir. 1975); *Cerro Sales Corp. v. Atlantic Marine Enterpises*, 403 F. Supp. 562, 567 (S.D. N.Y. 1975).

Second, it is undisputed that petitioners failed to equip the GLADIOLA with a flange joint as required by Lloyd's Rules, Chapter E, Section 312, under which this vessel was classified. (Opinion pp. 14-15; F.F. 31(2)). Moreover, the SERTO brand compression fitting used instead of the required flange joint contained an admittedly improper ERMERTO brand ferrule which inevitably caused the joint to separate, resulting in the fire. (F.F. 11, 31(5)).[4] This inexcusable condition was also the result of personal neglect and fault. *New York Mdse. Co. v. Liberty Shipping Corp.*, 509 F.2d 1249, 1252 (9th Cir. 1975); *Asbestos Corp. Ltd. v. Compagnie de Navigation*, 480 F.2d 669 (2d Cir. 1973).

The petition does ~~not contest these facts which *alone* fully~~ support the Court of Appeals' decision.[5] Both the COGSA fire exemption and the Nineteenth Century Fire Statute preclude exoneration when the fire loss is caused by such personal neglect or fault. Thus, even assuming the merit of all of petitioners' contentions concerning due diligence and the saving clause, 46 U.S.C. § 1308, respondent would still be entitled to a judgment in its favor. This Court should not grant review when a petitioner's quarrel with the decision below is purely semantic and when no change in the decision would result.

4. The District Court found that "a SERTO ferrule should have been maintained" in the joint. (F.F. 32).

5. Nor did petitioners challenge this holding in their Petition for Rehearing, discussed below in connection with the timeliness of this request for review.

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied because:

1. Petitioners seek no more than a change in verbage which would not affect the result;

2. The Court of Appeals' decision is in accord with the history and purposes of the statutes involved, is mandated by the clear language of COGSA, is consistent with foreign authorities interpreting the Hague Rules (upon which COGSA is based), conforms with the decisions of this Court, and is not in conflict with any other decision in point;

3. There is no important question which need be settled by this Court; and

4. The petition is untimely.

THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE HOLDINGS OF THIS OR ANY OTHER COURT

The decision below does not conflict with *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 53 S. Ct. 200 (1932). That case, decided in 1932 prior to the enactment of COGSA, concerned only the Nineteenth Century Fire Statute. The fire resulted from spontaneous combustion caused by the negligence of the Chief Engineer in stowing a supply of new coal on top of old coal. Neither a lack of proper training of the crew nor a patent defect in the vessel constituting inexcusable unseaworthiness was in issue. The case holds merely that the Harter Act, which contains no fire exemption, had no effect on the Nineteenth Century Fire Statute. If Harter contained a COGSA-like fire exemption, the result would have been different.

In *Hoskyn & Co., Inc. v. Silver Line, Ltd.*, 143 F.2d 462 (2d Cir. 1944), neither the district court nor the Court of Appeals made even a passing reference to COGSA. The case dealt solely with the Nineteenth Century Fire Statute. Nor was it established that the fire resulted from the unseaworthy condition of the auxiliary diesel engine, as is implied by petitioners. While the vessel was found to be unseaworthy, it was not shown that this unseaworthiness had any causal relation to the fire.

American Tobacco Co. v. The KATINGO HADJIPATERA, 194 F.2d 449 (2d Cir. 1951); *A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd.*, 199 F.2d 134 (4th Cir. 1952), *cert. denied*, 345 U.S. 992 (1953); and *Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72 (2d Cir. 1955), are all cases involving allegedly improper stowage which caused fires. In all of these cases it was held that stowage was *not* negligent, so the issue here was not there decided. Also, it should be noted that the availability of the COGSA § 4 defenses is expressly conditioned only upon compliance with § 3(1), and not § 3(2) which specifically deals with stowage.[6]

In any event, the dicta in these cases is primarily directed to the Nineteenth Century Fire Statute, with no discussion of the effects of COGSA §§ 3(1) and 4(1).[7] Further, the dicta is colored by the fact that the Courts, *without discussion*, assumed the purposes and effect of the COGSA fire exemption and the Nineteenth Century Fire Statute are the same. 199 F.2d at 143, 144; 224 F.2d at 75. None recognized, as did the Ninth Circuit below, that "the purpose of COGSA was to upgrade the protection afforded the cargo owners

6. Improper stowage can result in unseaworthiness for some purposes. However, Congress may have felt that this type of unseaworthiness should not preclude the carrier from relying upon the § 4(2) defenses.

7. *Petition of Skibs A/S Jolund*, 250 F.2d 777 (2d Cir. 1957), is another irrelevant stowage case. This is but the first of a series of three opinions on two appeals in this case (*Verbeeck v. Black Diamond Steamship Corp.*, 269 F.2d 68 (2d Cir. 1959), *rehearing*, 273 F.2d 61 (2d Cir. 1959), the end result of which, as stated by several authorities, is quite uncertain. Gilmore and Black, *The Law of Admiralty* (2d Ed. 1975), § 10-24, p. 895 n.105s; Thede "Statutory Limitations, etc.", 45 Tulane L.R. 959, 986 (June 1971).

and downgrade the protection afforded the interests of the shipowners and charterers." (Opinion pp. 27-28). The dicta has no precedential value, stems from a lack of careful analysis of the disparate purposes of the Acts, and was properly distinguished by the Ninth Circuit. (Opinion pp. 27-28). Such dicta does not raise a conflict between circuits meriting this Court's attention.

The Ninth Circuit's decision is consistent with and supported by that of the district court and Second Circuit in *Asbestos Corp., Ltd. v. Compagnie de Navigation,* 345 F. Supp. 814 (S.D.N.Y. 1972), *aff'd,* 480 F.2d 669 (2d Cir. 1973).[8] There an engine room fire could not be extinguished because all of the fire fighting equipment was either located in or controlled from the engine room. Both courts began their discussion by stating as the initial issue, "whether the defendant [shipowners] exercised due diligence before and at the beginning of the voyage to make the ship seaworthy." 345 F.Supp. at 816.[9] The district court found that the vessel "was unseaworthy in that the defendant shipowners failed to exercise due diligence in equipping [the vessel] with adequate means for fighting an engine room fire," and held that the owners were not exempt from liability under the Nineteenth Century Fire Statute or the COGSA fire exemption. 345 F. Supp. at 823. The Second Circuit agreed:

8. Petitioners claim that the findings and conclusions of the District Court were the product of "extensive personal research" by the district judge (Petition for Writ of Certiorari, p. 6, n.2). Yet, *Asbestos Corp.* is the only case cited by the district judge as support for any of his conclusions regarding immunity from fire liability and, as recognized by the Ninth Circuit, he misread that case.

9. The Second Circuit restated the issue as "whether the [vessel] was unseaworthy," citing COGSA §§ 3(1) and 4(1), 480 F.2d at 670 & n.2. The district court also noted that it was the carrier's burden to exercise such due diligence under COGSA § 3(1). 345 F. Supp. at 820.

> "[The district court] held that an inexcusable condition of unseaworthiness of a vessel, which in fact causes the damage—either by starting a fire or by preventing its extinguishment—will exclude the shipowners from the exemption of the Fire Statute and COGSA. We agree." 480 F.2d at 672.

The "inexcusable condition of unseaworthiness" referred to resulted from conduct which constituted a lack of due diligence to make the vessel seaworthy. Indeed, in that case as in this one, the facts show not only a lack of due diligence but also personal "design or neglect" and "actual fault, or privity."

Hershey Chocolate Corp. v. The S.S. ROBERT LUCKENBACH, 184 F. Supp. 134 (D. Ore. 1960), *aff'd sub nom. Albina Engine & Machine Works, Inc. v. Hershey Chocolate Corp.,* 295 F.2d 619 (9th Cir. 1961),[10] is consistent with and demonstrates the wisdom of the Ninth Circuit's holding herein. In *Hershey Chocolate* the issue involved here was not raised since the vessel was seaworthy at the inception of the voyage and only became unseaworthy at the discharge port, due to the negligence of the owner's employees. Thus, the pre-conditions of the fire exemption statutes were satisfied.

The facts of *Hershey Chocolate* are precisely those under which an owner should be exonerated from fire liability. The owner and its employees had exercised due diligence before the voyage and provided a seaworthy vessel. Once the vessel had passed from the owner's control, the owner was not responsible for the negligence of employees contributing to the loss. See also *The LINSEED KING,* 285

10. The Court of Appeals hardly ignored *sub silentio* this earlier decision as charged by petitioners, considering that the Court cited it. (Opinion p. 17). The Court had little reason to discuss the case at length since it was not relied upon by petitioners in their Reply Brief below.

U.S. 502, 511-12, 52 S. Ct. 450, 452-53 (1932), which clearly makes this distinction in a limitation of liability case.

THE COURT OF APPEALS' DECISION, IN THE SPIRIT OF UNIFORMITY OF INTERPRETATION OF THE HAGUE RULES, FOLLOWS FOREIGN AUTHORITIES ON POINT

Two other courts which have directly ruled on the due diligence requirements of COGSA as a prerequisite to the fire exemption are the British Privy Council, in *Maxine Footwear Co. v. Canadian Merchant Marine*, 1959 A.C. 589, [1959] Vol. 2 Lloyd's List L.R. 105 (1959), and the Supreme Court of Canada, in *The ANGLO INDIAN*, 1944 A.M.C. 1407, 1417, 1419. Both involved the Canadian COGSA, which like its American counterpart was taken almost bodily from the Hague Rules.[11] Both held that due diligence to make the vessel seaworthy is a pre-condition to reliance upon the COGSA fire exemption.

In following these authorities, the Court of Appeals adhered to this Court's admonition that the very purpose of the Brussels convention was to adopt a set of rules that could be uniformly enforced throughout the shipping world.

> "The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924, 51 Stat. 233. The effort of those rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade." *Herd & Co., Inc. v. Krawill Machinery Corp.*, 359 U.S. 297, 301, 79 S. Ct. 766, 769 (1959).

11. The trial court's treatment of *Maxine Footwear* demonstrates its lack of understanding of the history and language of the statutes involved. The Court said: "Although the Court in that case did place the burden of proving initial seaworthiness on the carrier, that case was dealing with a Canadian statute fashioned on the Hague Rules." (C.L. 5). The District Court overlooked the obvious and significant facts that both the American and the Canadian COGSA's are fashioned on the Hague Rules, and both are identical in every material respect with regard to the fire exemption.

Effecting this laudable purpose is no cause for review.

THE CONSIDERATIONS PRESENTED BY AMICUS CURIAE DO NOT MERIT REVIEW

Amicus curiae, like petitioners, fails to address the fact that the Court of Appeals found the "design or neglect" and "fault or privity" required under their view.

> "Here, the design or neglect was that of managing officers or supervisory employees, not that of the master or crew or subordinate employees. The 'design or neglect' being the failure to provide a proper compression or flange joint and to properly man and equip a trained crew prior to commencement of the voyage." (Opinion pp. 17-18).

Acceptance of all of the contentions of *amicus curiae*, therefore, would not change the result.

This P & I underwriter's arguments, aimed at foisting upon the insurer of innocent cargo interests the loss caused by petitioners' personal fault and neglect are almost entirely outside of any record of these proceedings, and its forecast of doom (and higher grocery prices) if this is not done are pure speculation, resulting from poor analysis of the case law and the legislative history of the fire exemption statutes.

This Court need not intercede in this battle between cargo and P & I insurers. The Ninth Circuit has properly placed the loss on the underwriter who can do something to make ocean transportation safe for cargo and crew by bringing economic pressure, in the form of higher premiums, to bear

on owners and charterers who fail to provide properly manned and seaworthy vessels. Cargo underwriters are in no position to apply such pressure to the ocean carriers.

IN ANY EVENT, THE PETITION IS UNTIMELY

Petitioners had 90 days from the date of judgment in which to file their petition. 28 U.S.C. § 2101(c). The decision of the Court of Appeals was filed on March 8, 1979. The petition was received by respondent, and presumably filed, on July 16, 1979, 130 days later.

Petitioners filed a Petition for Rehearing on April 3, 1979, which was denied on April 19, 1979. In order for a petition for rehearing to suspend the finality of the Court's judgment and to terminate the running of the time within which review must be sought, it must have the potential for setting aside or modifying the judgment. *Department of Banking, etc. v. Pink*, 317 U.S. 264, 266, 63 S. Ct. 233, 234 (1942); *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 205-06, 63 S. Ct. 543, 544 (1943); *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20, 73 S. Ct. 85, 86 (1952). Here the Petition for Rehearing did no more than attempt to clean up some of the language used by the Ninth Circuit in its opinion. Petitioners did not challenge the Court's basic holding that their fault and neglect had caused the fire and the loss, a holding which also goes unchallenged in this Court. Granting the rehearing upon the grounds asserted would not have resulted in vacation or modification of the judgment, so the running of the ninety day period was not terminated. At most the period was temporarily tolled during pendency of the Petition for Rehearing and continued running after denial. In either event, this Petition for a Writ of Certiorari was not timely filed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court of Appeals reached a just and proper result. It corrected manifest misconceptions of the law by the trial court and put into proper perspective the various legislative enactments governing the relationship between cargo and carrier. It has simply followed the intent of Congress clearly expressed in the fire exemption statutes. The decision is not in conflict with any decision of this or any other Court, and in fact, achieves a result consistent with the decisions of this Court, the lower federal courts and foreign courts. Petitioners seek only a modification of language, not of result, and review by this Court is not warranted. It is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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